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IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

ALFRED J. KOONIN,
Petitioner,

–against–

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NATHAN Z. DERSHOWITZ
AMY ADELSON
DERSHOWITZ, EIGER
& ADELSON, P.C.
220 Fifth Avenue
Suite 300
New York, NY 10001
(212) 889-4009

DANIELA KLARE ELLIOTT
Of Counsel

Attorneys for Petitioner
ALFRED J. KOONIN

QUESTIONS PRESENTED FOR REVIEW

1. Whether an indictment, brought under the five-year general statute of limitations set forth at 18 U.S.C. § 3282, is time-barred if it does not allege that an overt act occurred within the five years preceding its filing, as the First, Sixth and Tenth Circuits have held; or whether the Ninth and Eleventh Circuits are correct in holding that the indictment is timely if it alleges an overt act occurred within five years and one day preceding its filing.

2. Whether telephone calls made after the object of a conspiracy has concluded, which calls do not further the conspiratorial agreement, extend the conspiracy for statute of limitations purposes.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is partially reported at 361 F.3d 1250 (9th Cir. 2004), and is set forth at App. 1. The unpublished portion of the opinion is set forth at App. 10. The order denying petitioner's petition for rehearing and rehearing en banc is not reported, and is set forth at App. 13.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 25, 2004. (App. 1) Petitioner's timely filed petition for rehearing and for rehearing en banc was denied on August 31, 2004. (App. 13) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

18 U.S.C. § 3282(a) provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

This Petition raises two important statutory issues stemming from the trial and conviction of Dr. Alfred J. Koonin. Koonin was indicted on February 23, 2001, for conspiracy and other offenses in connection with a murder-for-hire that was attempted – and failed – on February 23, 1996. On November 16, 2001, Koonin was convicted, and on June 26, 2002, he was sentenced to a term of imprisonment of 181 months. On March 25, 2004, the Ninth Circuit affirmed the conviction. (App. 1) Petitioner's petition for rehearing and for rehearing en banc was denied on August 31, 2004. (App. 13)

1. The first issue raised in this Petition is one that has for many years sharply divided the lower courts. The question is how properly to calculate the time comprising a statute of limitations: specifically, whether an indictment brought under the five-year general statute of limitations that is set forth at 18 U.S.C. § 3282 is untimely if no overt act occurred within the five years preceding its filing.

In this case, the indictment charged a conspiracy to murder Sydney Kahn. On the morning of February 23, 1996, Valter Nebiolo attempted, and failed, to kill Kahn. Nebiolo fired several shots through a window at Kahn, but no bullets struck him and Kahn received only minor wounds from the broken window glass. The indictment charged that Nebiolo was hired to kill Kahn by a South African businessman named Ronald Abel.

The police traced the license plate of the car seen leaving the scene of the shooting to Nebiolo's rental car, and learned that the address that Nebiolo gave to the rental car agency was Koonin's. Nebiolo was arrested outside Koonin's apartment building later on February 23, 1996, and taken into custody.

At approximately 1:00 a.m. on February 24, 1996, two San Diego police detectives visited Koonin at his apartment. They informed Koonin of Nebiolo's failed attempt on Kahn's life, and noted that Koonin displayed shock and surprise at that news. Koonin fully cooperated with the detectives from the outset, and told them everything he knew about Nebiolo. He told them that Abel, who was an old friend of Koonin's from South Africa, had telephoned Koonin to say that Nebiolo was coming to Los Angeles on business for him (Abel). Abel asked Koonin, as a favor, to let Nebiolo to stay with him, and to help him find his way around because Nebiolo had never been to California before. Koonin obliged, and when Nebiolo arrived, took him to a car rental agency. Koonin told the police he understood Nebiolo to be visiting on business for Abel, but did not know the details of that business.

Subsequently, Koonin was instructed by an FBI agent to report to the FBI the contents of any call he received from Abel. Accordingly, Koonin informed the FBI that Abel telephoned him on February 26, 1996 to ask whether Nebiolo was returning to South Africa, and that, after Koonin told him what had transpired and asked what was going on, Abel hung up. Koonin similarly reported to the FBI a second call from Abel on February 28, 1996, to ask whether there had been an article about him in the Los Angeles Times. As Koonin told the FBI, he told Abel no.

Koonin continued to cooperate with the Government, and testified voluntarily before a grand jury in July, 1996, in support of an indictment against Abel and Nebiolo.

However, after Nebiolo negotiated his plea agreement with the Government and agreed to cooperate in future proceedings against Abel – whom the government was seeking to extradite from South Africa – Nebiolo told the FBI, in July, 1997, that Koonin supplied him with the gun that he used to shoot at Sydney Kahn. When the FBI questioned Koonin about the gun six months later, Koonin told the agents that he owned

a non-working .22 automatic gun, but did not know where it was. A week later, he advised the FBI agents that he could not find it. Ultimately, the gun that Nebiolo used in the February 23, 1996 shooting – which he dropped and left behind outside Kahn's office – was not introduced into evidence; the FBI never obtained the gun from the San Diego police, who destroyed it at the end of 1999.

Nonetheless, on February 23, 2001, an indictment was filed charging Koonin and Abel with crimes that included conspiring to travel in interstate commerce for murder-for-hire. It charged that Koonin's role in the conspiracy was to assist Nebiolo in obtaining a car, a gun and lodging.

On appeal, Koonin asserted that the indictment was untimely because it was filed five years and one day after the object of the conspiracy – the shooting of Sydney Kahn – was completed. Koonin argued that the limitations period began to run on the day of the attempted shooting.

The Ninth Circuit, "persuaded by the reasoning of the Second and Eleventh Circuits," disagreed and held that:

> the statute of limitation did not begin to run until the day *after* the shooting, and thus Koonin's indictment was filed on the last possible day of the limitation period.

App. 7. (Emphasis in original)

The Ninth Circuit's reasoning in holding that the statute of limitations began to run on the day after the attempted shooting – but still encompassed the day of that act – is in conflict with this Court's jurisprudence and with decisions rendered by its sister Circuits that require proof of an overt act within five years of the indictment's filing date.

Put simply, to be valid, an indictment such as this one, filed on February 23, 2001, may only prosecute acts done on or after February 24, 1996.

2. The second issue raised in this Petition concerns the Ninth Circuit's suggestion, although not a holding, that the statute of limitations period was extended because of Abel's two brief phone calls to Koonin after Nebiolo was arrested and after Koonin had cooperated with the police. This related issue arises only due to the Ninth Circuit's suggestion that it could, in the alternative, resolve the question raised on appeal – the timeliness of the indictment – by deeming the limitations period extended. The Ninth Circuit relied on a misinterpretation of this Court's decision in United States v. Jimenez Recio, 537 U.S. 270, 275 (2003), which should be clarified so that the Jimenez Recio decision does not become the vehicle for allowing the statute of limitations to be indefinitely extended in conspiracy cases.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER HOW PROPERLY TO COUNT THE TIME THAT COMPRISES THE STATUTE OF LIMITATIONS SET FORTH AT 18 U.S.C. § 3282(a)

Few questions are more fundamental to the integrity of a prosecution than whether it was timely brought. The first issue raised in this Petition is whether an indictment, brought pursuant to 18 U.S.C. § 3282(a), is untimely if no overt act took place within the five years preceding its filing. Although in the Ninth and Eleventh Circuits, such an indictment would be timely, in three other Circuits it would be time-barred. In still two other Circuits, which have internal conflicts, there is no clear answer.

Thus, because there is a a genuine conflict among (and within) the Circuits on the interpretation of this federal criminal

statute, an inequitable circumstance has developed in which, on a particular date, the government is time-barred from indicting a person on a set of charges in one Circuit, but free to indict on the identical charges in the neighboring Circuit.

Given the tremendous upsurge in federal conspiracy prosecutions over the past decade, this question regularly arises in the Circuit courts. Therefore, in order to prevent similarly-situated defendants in different Circuits from receiving wholly disparate treatment, and in order to preserve the integrity of federal prosecutions where indictments were filed close to the date of the statute of limitation's expiry, it is essential that a single and unified interpretation of the statute of limitations time frame govern across all the Circuits.

This Court had appeared to have settled the question. In Grunewald v. United States, 353 U.S. 391 (1957), this Court stated:

> The indictment in these cases was returned on October 25, 1954. It was therefore incumbent on the Government to prove that the conspiracy, at least as contemplated in the agreement as finally formulated, was still in existence on October 25, 1951, and that at least one overt act in furtherance of the conspiracy was performed after that date.

353 U.S. 391 at 396. (Emphasis supplied) As set forth below, however, despite the Grunewald holding, the Courts have disagreed on whether an indictment is untimely if no overt act took place within the five years preceding its filing.

A. Circuits Following Grunewald

Most Courts – including the First, Sixth and Tenth Circuits, and, in part, the Second and Fifth Circuits – have followed Grunewald and held that for statute of limitations

purposes, an indictment filed on, for example, February 23, 2001, does not extend back to acts committed on February 23, 1996, but only to acts committed on or after February 24, 1996. These Circuits, applying Grunewald, have framed the question at issue this way:

> The original indictment was returned on April 14, 1989. The applicable statute of limitation is five years. 18 U.S.C. § 3282. The government must show that the conspiracy continued and at least one overt act in furtherance of the conspiracy occurred after April 14, 1984. Grunewald v. United States, 353 U.S. 391, 397, 77 S.Ct. 963, 970 1 L.Ed.2d 931 (1957).

United States v. Lash, 937 F.2d 1077, 1081 (6th Cir.), cert. denied, 502 U.S. 949 (1991) (Emphasis added). See also United States v. Brown, 332 F.3d 363, 373 (6th Cir. 2003) (January 20, 1999 indictment; in order to carry its burden at trial, the government had to show beyond a reasonable doubt that the specific conspiracy defendants joined was on-going after January 20, 1994); United States v. Fitzpatrick, 892 F.2d 162, 166 (1st Cir. 1989) (indictment returned October 1, 1987; Court looks to "the post-October 1, 1982 evidence to determine if the statute of limitations is a bar to the defendant's prosecution on the substantive count of the indictment"); United States v. Pinto, 838 F.2d 426, 435 (10th Cir. 1988) (April 1, 1986 indictment and six-year statute of limitations: "It therefore was incumbent upon the government to prove that the conspiracy was still in existence on April 1, 1980, and that at least one overt act in furtherance of the conspiracy was performed after that date.")

B. Circuits In Conflict

The Second and Fifth Circuits have similarly followed Grunewald in some decisions, but in other decisions have interpreted the § 3282 statute of limitations to reach the opposite conclusion.

I. The Second Circuit

The Second Circuit has followed Grunewald, for example, in United States v. Brasco, 516 F.2d 816 (2d Cir.), cert. denied, 423 U.S. 860 (1975), involving a single-count conspiracy to influence the Post Office, where the Second Circuit held that for the indictment filed on October 23, 1973 to be timely, the government "had to show that one overt act in furtherance of the conspiracy occurred after October 23, 1968," id. at 818 (emphasis supplied), citing Grunewald v. United States, 353 U.S. 391 (1957) and United States v. Portner, 462 F.2d 678 (2d Cir.), cert. denied, 409 U.S. 983 (1972). The Second Circuit also hewed to Grunewald in United States v. Fletcher, 928 F.2d 495, 498-99 (2d Cir.), cert. denied, 502 U.S. 815 (1991) ("Since the indictment was filed on April 4, 1989, the central issue is whether any of the actions taken on April 5, 1983 [ ] furthered the main goals of the conspiracy") and United States v. Salmonese, 352 F.3d 608, 614 (2d Cir. 2003) (indictment was filed on May 7, 2001, so Court looked at acts on and after May 8, 1996).

However, the Second Circuit disregarded Grunewald in United States v. Guerro, 694 F.2d 898 (2d Cir. 1982), cert. denied, 459 U.S. 1222 (1983), involving a conspiracy to receive and sell stolen plastic explosives. The single charged sale took place on December 29, 1976, and the Second Circuit approved

the indictment filed on December 29, 1981, relying – without analysis – on the "long-established" *civil* rule enunciated in Burnet v. Willingham Loan & Trust Co., 282 U.S. 437, 439 (1931), where this Court stated that, generally:

> When the period allowed for doing an act is to be reckoned from ... the happening of any ... event, the day on which the event happened may be regarded as an entirety, or a point of time; and so may be excluded from the computation.

Burnet, 282 U.S. at 439, quoted in Guerro, 694 F.2d at 901. That rule extended to criminal cases, the Second Circuit reasoned, through the language of the general filing rule of then-Rule 45 of the Federal Rules of Criminal Procedure.[1] Guerro, 694 F.2d at 901-02. Although acknowledging that Rule 45 is "not controlling" because – unlike a statute of limitations – the filing rule automatically extends a computed period that would otherwise end on a weekend or holiday to the next non-holiday weekday, the Second Circuit nevertheless, without explanation, deemed Rule 45 "instructive," id., and upheld the conviction.

ii. The Fifth Circuit

Similarly, the Fifth Circuit's holdings have not been consistent. That Court followed Grunewald when it reversed a conviction in United States v. Bethea, 672 F.2d 407 (5th Cir.

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[1] Guerro quoted Rule 45(a) – in effect in 1982 – as providing that "In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included ..." (Emphasis supplied). The present wording of Rule 45(a) could no longer extend to 18 U.S.C. § 3282, since it is specifically limited to the computation of "any period of time specified in these rules, any local rule, or any court order."

1982), on the ground that the indictment was time-barred; that is, the February 21, 1980 indictment required proof of an overt act after February 21, 1975. Id. at 419.[2] See also United States v. Mann, 161 F.3d 840, 856-57 (5th Cir. 1989), cert. denied, 526 U.S. 1117 (1999) (indictment issued on June 30, 1993; "to fall within the applicable limitations period[], the last act in furtherance of a conspiracy . . . had to occur after June 30, 1988.").

Like the Second Circuit, the Fifth Circuit has also taken a contrary position: in United States v. Davis, 533 F.2d 921, 926 (5th Cir. 1976), the Fifth Circuit determined that for an indictment filed on September 5, 1974 to be valid, the government had to allege and prove that an overt act occurred on or after September 5, 1969. However, because it concluded that the last overt act took place weeks before that date, the Davis Court did not actually apply its stated "on or after" test. Nonetheless, as set forth below, the Ninth Circuit, in this case, relied on Davis's "on or after" language to find Koonin's indictment timely.

C. Circuits Ignoring Grunewald

Thus, the Ninth Circuit's conclusion that, to satisfy § 3282's five-year statute, an indictment filed on February 23, 2001 requires an overt act on or after February 23, 1996 – rather than after February 23, 1996 – is in direct conflict with this Court's holding in Grunewald, and the holdings of its sister Circuits.

Indeed, the Koonin Court did not even mention Grunewald in its decision. Instead, it deemed the indictment timely by relying on the Second Circuit's ruling in Guerro, supra,

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[2] The Koonin Court purported to distinguish Bethea as a Fifth Circuit "drafting error." (App. 8, n.5)

the Fifth Circuit's language in Davis, supra, and the Eleventh Circuit's adoption of Guerro in United States v. Butler, 792 F.2d 1528, 1533 (11th Cir.), cert. denied, 479 U.S. 933 (1986) (conspiracy to import marijuana continued until July 12, 1979, when vessel carrying marijuana was boarded and seized; indictment filed on July 12, 1984 was timely).[3]

In Koonin, the Ninth Circuit also relied on two cases that were guided by the *civil* rule, one of which was a 1930's case significantly predating Grunewald: Wiggins v. United States, 64 F.2d 950 (9th Cir.), cert. denied, 290 U.S. 657 (1933) (relying on civil rule in Burnet v. Willingham Loan & Trust Co., 282 U.S. 437 (1931)), and United States v. Tawab, 984 F.2d 1533 (9th Cir. 1993)(per curiam) (relying on Burnet and Wiggins).

The Ninth Circuit's decision is even contrary to its own precedent. See, e.g., United States v. Charnay, 537 F.2d 341 (5th Cir.), cert. denied, 429 U.S. 1000 (1976) (statute of limitations in conspiracy cases starts to run on date of last overt act); Lambert v. Conrad, 308 F.2d 571 (9th Cir. 1962) (per curiam)(statue of limitations for civil conspiracy ran from the date of the last overt act); and Bergschneider v. Denver, 446 F.2d

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[3] The D.C. Circuit, which has not addressed the question directly, has interpreted the statute in dicta. Despite its repeated references to Grunewald, the Court has used language that is more aligned with the reasoning of the Ninth and Eleventh Circuits. In United States v. Hitt, 249 F.3d 1010, 1015 (D.C. Cir. 2001), that Court affirmed the dismissal of a conspiracy count on the grounds that, in order for the October 19, 1999, indictment to be timely, the government had to show that a conspiracy existed and an overt act occurred "no more than five years prior to the filing of the indictment (i.e., at a point no earlier than October 19, 1994);" since the conspiracy ended on September 14, 1994, the indictment was untimely by more than a month.

569 (9th Cir. 1971)(per curiam)(same). (App. 9) However, the Ninth Circuit discounted those cases because they did not confront the same "precise issue" – that is, they did not involve prosecutions in which the indictment was filed on the anniversary of the last overt act.

Congress has declared that the statute of limitations should not be extended "[e]xcept as otherwise expressly provided by law." 18 U.S.C. § 3282. This Court has also held that "criminal limitations statutes are to be liberally interpreted in favor of repose." Toussie v. United States, 397 U.S. 112, 115 (1970), quoting United States v. Scharton, 285 U.S. 518, 522 (1932). Cases, like this one, in which the Courts rely on the rules relating to the filing of papers, extend the statute of limitations by one day. It is important that this Court clarify and define the correct interpretation of § 3282's statute of limitations, so that the government may not take advantage of the split among and within the Circuits improperly to extend the statute of limitations.

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY WHEN A CONSPIRACY CONTINUES FOR STATUTE OF LIMITATIONS PURPOSES, AFTER ITS PURPOSE HAS BEEN DEFEATED

Conspiracy has been called the "darling of the modern prosecutor's nursery." Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925)(J. Learned Hand). Over fifty years ago, Justice Jackson criticized the evolution of conspiracy law for creating an "elastic, sprawling, and pervasive offense" that, if unchecked, could create "a serious threat to fairness in our administration of justice." Krulewitch v. United States, 336 U.S. 440, 445-46 (1949)(J. Jackson, concurring).

This case opens a new chapter in the seemingly endless broadening of conspiracy law. Once again demonstrating the "tendency of a principle to expand itself to the limit of its logic,"

id. at 445 (quoting Justice Cardozo, "The Nature of the Judicial Process," p. 51), the Ninth Circuit, relying on United States v. Jimenez Recio, 537 U.S. 270 (2003), has essentially converted conspiracy into a crime without a statute of limitations. Although ambiguous,[4] the Ninth Circuit appears to have expanded Jimenez Recio by suggesting that a telephone call between co-conspirators after the goals of the conspiracy have been defeated will extend the statute of limitations, even if the conversation did not further the conspiratorial agreement. This case presents an opportunity for this Court to act quickly to correct this misapplication of Jimenez Recio, and to clarify that Jimenez Recio is not a license for prosecutors to circumvent the statute of limitations for federal conspiracies.

Jimenez Recio addressed a limited question: are there circumstances in which a defendant can join a conspiracy after the government has thwarted its ends? This Court concluded that because the essence of a conspiracy is the "agreement to commit an unlawful act," 537 U.S. at 274, the government's defeat of the conspiracy's objectives will not "necessarily and automatically terminate the conspiracy." Id. at 275. If the defendant is unaware that the conspiracy's goals have been defeated, but continues to take steps in furtherance of the agreement, he can be convicted of participating in the conspiracy although it can no longer succeed.

Jimenez Recio did not address, explicitly or implicitly, the very different question of whether, for statute of limitations

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[4]The Ninth Circuit did not hold that the statute of limitations was extended by virtue of the phone call from Abel to Koonin on February 28, 1996. The Court wrote only that "if we accept the government's argument that the conspiracy continued until February 28, 1996," then the indictment was "well within the five-year statute of limitation." (App. 6). (Emphasis added)

purposes, a conspiracy continues even after its goals have been defeated. In this case, the conspiracy to murder Kahn ended on February 23, 1996, not only because of the arrest of Nebiolo, but because the attempted murder had failed. Nebiolo dropped his gun and fled. The objectives of the conspiracy had not been accomplished. No steps were taken after that date to revive the conspiracy or to further the alleged agreement to murder Kahn. Abel called Koonin after Nebiolo was arrested and after Koonin had already spoken to the police, but the content of the two brief conversations is not recorded. Abel did not testify and Koonin, who was already cooperating with the FBI when these two conversations took place, testified only that, in the first conversation, Abel asked him if Nebiolo had left the United States, and he then told Abel about Nebiolo's arrest, and, in the second, that Abel called to tell him about a newspaper article. Neither of these brief conversations involved any effort to revive the failed agreement, and neither, under Jimenez Recio, extends the statute of limitations.

That the Ninth Circuit's expansive reading of Jimenez Recio is wrong is underscored by this Court's consistent emphasis on the importance of the statute of limitations as a means of protecting the defendant. Because the Sixth Amendment speedy trial right does not apply until the commencement of the criminal action, statutes of limitations are the "primary guarantee against bringing overly stale criminal charges." United States v. Marion, 404 U.S. 307, 322 (1971). Consequently, they are to be liberally interpreted in favor of repose. United States v. Habig, 390 U.S. 222, 227 (1968). See also Toussie v. United States, 397 U.S. 112, 114 (1970); Marion, 404 U.S. at 322, n.14.

Statutes of limitations begin to run when the crime is complete. Toussie, 397 U.S. at 115. A conspiracy ends when its central purpose has been accomplished. Krulewitch, 336 U.S. at 442. Even acts of concealment will not extend the statute of limitations if the primary object of the conspiracy has been

attained. Grunewald, 353 U.S. at 401-02. Surely, then, if the primary object of the conspiracy has become impossible, mere contact between the co-conspirators will not extend the limitations period.

This Court "view[s] with disfavor attempts to broaden the already pervasive and wide-sweeping prosecution of conspiracy prosecution." Grunewald, 353 U.S. at 404. If the Ninth Circuit's misinterpretation of Jimenez Recio is not quickly corrected, it is likely to take root and become the law throughout the country. In conspiracy cases, the protections of the statute of limitations may well become illusory. This Court also should grant certiorari to address the alternative reasoning of the Ninth Circuit and resolve this additional important question.

III. PETITIONER PRESERVES HIS RIGHT TO SEEK VACATION OF HIS SENTENCE IF IT IS AFFECTED BY THIS COURT'S DECISIONS IN CASES FOLLOWING BLAKELY

Finally, in view of this Court's holding in Blakely v. Washington, 124 S. Ct. 2531 (2004), and because this petition arises from petitioner's direct appeal to the Ninth Circuit, petitioner preserves his right to have his sentence vacated if it is affected by this Court's decisions in United States v. Booker, (U.S.S.C. Docket No. 04-104), and United States v. Fanfan, (U.S.S.C. Docket No. 04-105).

CONCLUSION

This Petition raises two important constitutional issues about which the law is in conflict. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Nathan Z. Dershowitz
Amy Adelson
DERSHOWITZ, EIGER
& ADELSON, P.C.
220 Fifth Avenue
Suite 300
New York, NY 10001
(212) 889-4009

COUNSEL OF RECORD

Daniela Klare Elliott
Of Counsel

November 19, 2004

APPENDIX

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Alfred J. **KOONIN**, Defendant-Appellant.

No. 02-50350.

Argued and Submitted Aug. 6, 2003.
Filed March 25, 2004.

Appeal from the United States District Court for the Southern District of California; Napoleon A. Jones, District Judge, Presiding. D.C. No. CR-96- 01442-NAJ.

Before: NOONAN, TALLMAN, and RAWLINSON, Circuit Judges.

RAWLINSON, Circuit Judge:

The question we must decide is whether the statute of limitation begins to run on the day of the last overt act in furtherance of a conspiracy, or the following day. Agreeing with the Second and Eleventh Circuits, we hold that when computing the time within which a prosecution for conspiracy may be commenced, the statute of limitation begins to run the day *after* the last overt ac is committed. [FN1] Our holding AFFIRMS the conviction in this case.

> FN1. Koonin raised other issues on appeal, which are resolved in a separate memorandum disposition filed contemporaneously with this opinion.

I. BACKGROUND

South African businessman Ronald Abel had two constants in his life--his childhood friend, Alfred Koonin, and his hapless business partner, Sydney Kahn. In 1986, a business deal between Kahn and Abel went awry. Kahn subsequently fled to La Jolla, California, leaving behind a large debt as well as several angry investors, including Abel. Over the next few years, Kahn repeatedly promised, yet failed, to repay the debt. As interest accrued, Kahn's debt continued to grow. Keeping pace with that debt was Abel's growing anger. In an attempt to appease Abel's wrath and assuage his financial concerns, Kahn unwisely named Abel the beneficiary of his three life insurance policies. If Kahn died, Abel stood to collect approximately $425,000.

By February 1996, Abel had decided to recoup his investment by collecting on these insurance policies. Of course, Abel could not collect as long as Kahn was alive. To hasten Kahn's demise, Abel hired Valter Nebiolo to travel from South Africa to California to kill Kahn. Nebiolo agreed to participate in the murder plot on the conditions that Abel share the insurance proceeds and supply airline tickets, expense money, a gun, a car for the trip to La Jolla, and a place to stay until the job was done. Abel agreed to all the conditions and gave Nebiolo the name and address of a friend who would provide Nebiolo with the gun, car, and lodging. That friend was Koonin.

On February 18, 1996, Nebiolo arrived in Los Angeles, California. Koonin met Nebiolo at the airport, drove him back to Koonin's apartment, and offered Nebiolo the choice of two handguns--a .44 magnum and a .357 magnum. Nebiolo examined the weapons, determined that both were loaded and in working condition, and chose the .357 as the murder weapon because it would be easier to conceal. Koonin also provided Nebiolo with a map to La Jolla and showed him the route to traverse.

The next day, Koonin helped Nebiolo rent a car and Nebiolo left for La Jolla. After watching Kahn's home and office for a few days, Nebiolo returned to Koonin's apartment in Los Angeles. The two discussed Nebiolo's reconnaissance trip and Nebiolo informed Koonin that the job would require a smaller, quieter gun. They also discussed Kahn, with Koonin assuring Nebiolo that Kahn was defrauding people in the United States just as he had done in South Africa. Koonin stated ***1252** that Kahn deserved to be killed, describing him as someone who "had it coming." Koonin then left his apartment for about two hours. When he returned, Koonin had what Nebiolo needed--a smaller gun. Nebiolo examined the .25 caliber semi-automatic pistol and confirmed that it was fully functional.

On February 23, 1996, Nebiolo returned to La Jolla to kill Kahn. Although grazed by two bullets and struck by flying glass, Kahn survived the attack. Nebiolo fled the scene, returning to Koonin's apartment, but was arrested that same day and subsequently indicted by a grand jury. Koonin's role in the conspiracy became clear only after Nebiolo pled guilty and agreed to cooperate with the government as part of his plea agreement.

On February 23, 2001, exactly five years to the day after Nebiolo attempted to kill Kahn, a grand jury returned a superseding indictment charging Koonin with conspiracy to travel and cause others to travel in foreign commerce in the commission of murder-for-hire, in violation of 18 U.S.C. § 1958(a); traveling and causing others to travel in foreign commerce in the commission of murder-for-hire, in violation of 18 U.S.C. § 1958(a); the extortionate collection of debt, in violation of 18 U.S.C. § 894; false declarations before a grand jury, in violation of 18 U.S.C. § 1623; [FN2] and aiding and abetting, in violation of 18 U.S.C. § 2. Koonin was convicted on all counts. [FN3]

FN2. In the grand jury proceedings, Koonin testified that he did not know the purpose of Nebiolo's trip to the United States. He stated that he never saw Nebiolo with a gun and was not aware that Nebiolo had one. Koonin also told the grand jury that he had no contact with Abel between February 18, 1996, when Abel called to confirm that Nebiolo had arrived in Los Angeles, and February 23, 1996, when Nebiolo was arrested in connection with the shooting.

FN3. Koonin was not named in Count Three of the superseding indictment.

Koonin appeals his conviction, arguing--for the first time on appeal--that the February 23, 2001 indictment was returned one day too late, thus barring prosecution of four of the five counts with which he was charged. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II. STANDARD OF REVIEW

[1][2][3] When a statute of limitation began to run is a question of law typically reviewed de novo. *Orr v. Bank of America*, 285 F.3d 764, 780 (9th Cir.2002). However, Koonin did not raise this particular issue before the district court. Failure to comply with the statute of limitation is an affirmative defense that is generally waived if not raised at trial. *United States v. LeMaux*, 994 F.2d 684, 689 (9th Cir.1993). Nevertheless, "[a]lthough the general rule in this circuit is that an appellate court will not consider an issue raised for the first time on appeal, we will reach the question if it is purely one of law and the opposing party will suffer no prejudice because of failure to raise it in the district court." *United States v. Thornburg*, 82 F.3d 886, 890 (9th Cir.1996) (citation omitted). Because the statute of limitation issue has been fully briefed by both parties, the government will not be prejudiced if we address it.

III. DISCUSSION

[4] Koonin was convicted of offenses that do not specify statutes of limitation. As a result, the five-year general statute of limitation for noncapital offenses applies. *See* 18 U.S.C. § 3282. [FN4] Nebiolo attempted ***1253** to murder Kahn on February 23, 1996. The superseding indictment charging Koonin for his role in the murder-for-hire plot was returned on February 23, 2001. Koonin argues that the indictment was filed one day too late, barring prosecution of every count but one--the perjury offense committed when Koonin testified before the grand jury. The government presents two counter-arguments: (1) the conspiracy did not actually end until February 28, 1996, and (2) even if the conspiracy did end on February 23, 1996, the statute of limitation did not begin to run until the following day.

> FN4. 18 U.S.C. § 3282 provides, in pertinent part, that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

The indictment specifically charges that the conspiracy continued up to and including February 28, 1996, when Abel called Koonin to confirm that Nebiolo had left the United States. During that phone call, Koonin informed Abel that Nebiolo had been arrested for attempted murder. According to Koonin, Abel was stunned to hear the news. The two spoke again approximately two days later when Abel called to see if his name had been mentioned in the newspapers in connection with the shooting.

The government contends that the phone call regarding Nebiolo's departure was the last overt act committed in furtherance of the conspiracy, thereby triggering the statute of limitation. In short, the government asserts that the conspiracy

ended, and the statute began to run, not when Nebiolo was arrested, but when all the conspirators realized that the murder-for-hire plot had been thwarted.

"[T]he Government's defeat of the conspiracy's objective will not necessarily and automatically terminate the conspiracy." *United States v. Jimenez Recio*, 537 U.S. 270, 275, 123 S.Ct. 819, 154 L.Ed.2d 744 (2003). In other words, "[w]here police have frustrated a conspiracy's specific objective but conspirators (unaware of that fact) have neither abandoned the conspiracy nor withdrawn," then the conspiracy continues. *Id.* The police frustrated the conspiracy's specific objective when they arrested Nebiolo on February 23, 1996. However, Abel's first subsequent phone call to Koonin asked, in effect, if Nebiolo had successfully accomplished the object of the conspiracy. Abel's stunned reaction to the news of Nebiolo's arrest demonstrates that he was unaware the murder-for-hire plot had unraveled, thereby establishing that Abel had neither abandoned nor withdrawn from the conspiracy before that point.

Although Koonin learned of Nebiolo's arrest hours after it took place on February 23, 1996, no evidence suggests that Koonin abandoned or withdrew from the conspiracy at that time. "Mere cessation of activity is not enough to start the running of the statute...." *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir.1964), *cert. denied*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). Instead, withdrawal requires "affirmative action, either the making of a clean breast to the authorities ... or communication of the abandonment in a manner reasonably calculated to reach co-conspirators." *Id.See also United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir.1992). Koonin undertook no such affirmative action.

If we accept the government's argument that the conspiracy continued until February 28, 1996, the indictment returned on February 23, 2001 was well within the five-year statute of limitation. However, even if we accept Koonin's argument that

the last overt act occurred when Nebiolo shot Kahn and that the conspiracy ended with *1254 Nebiolo's arrest on February 23, 1996, rather than February 28, 1996, the indictment was still timely. Persuaded by the reasoning of the Second and Eleventh Circuits, we hold that the statute of limitation did not begin to run until the day *after* the shooting, and thus Koonin's indictment was filed on the last possible day of the limitation period.

In United States v. Guerro, 694 F.2d 898 (2d Cir.1982), the defendants were charged with conspiracy to sell explosives stolen from the United States. The sale occurred on December 29, 1976, and the indictment was filed on December 29, 1981. *Id.* at 899. The "[d]efendants moved to dismiss the indictment on the ground that the prosecution was barred by the five-year period of limitations provided in 18 U.S.C. § 3282." *Id.* at 900. "On the premise that the day of the last overt act is counted as the first day of the limitations period," the defendants in *Guerro,* like Koonin, argued that the indictment was filed one day too late. *Id.*

The government countered that when "computing the time within which a prosecution may be commenced, the first day counted is the day *following* that on which the offense was committed." *Id.* (emphasis added). The Second Circuit agreed with the government's argument, noting that"[t]he long-established general rule is that a statute of limitations begins to run on the day following the day on which the event giving rise to the cause of action occurred." *Id.* at 901 *(citing Burnet v. Willingham Loan & Trust Co.,* 282 U.S. 437, 439, 51 S.Ct. 185, 75 L.Ed. 448 (1931)).

This principle, the Court noted, had been applied in criminal as well as civil cases. *Id. See, e.g., United States v. Davis,* 533 F.2d 921, 923, 926 (5th Cir.1976) (holding that for an indictment returned on September 5, 1974 to be timely, the government had to prove that the defendant committed an overt act in furtherance of the conspiracy *on or* after September 5, 1969) (emphasis

added). [FN5] As *Davis* illustrated, this principle was equally applicable to criminal prosecutions for substantive offenses as well as conspiracy charges. *See* Guerro, 694 F.2d at 903.

> FN5. Koonin's reliance on *United States v. Bethea*, 672 F.2d 407 (5th Cir.1982) is unavailing. In *Bethea*, the Fifth Circuit, seemingly contradicting its prior holding in *Davis*, found that for an indictment filed on February 21, 1980 to be timely, the government had to prove that the defendant engaged in racketeering activity after, rather than *on or* after, February 21, 1975. *See id.* at 419. It is unclear whether the creation of an intra-circuit split of authority was a purposeful reversal of *Davis* or the product of inadvertent oversight. Given that *Bethea* cites *Davis* with approval and does not expressly state, or even imply, that the decision overrules *Davis*, the omission appears to be a drafting error. In any event, *Davis* is consistent with our precedent, *see infra*.

In *United States v. Butler*, 792 F.2d 1528 (11th Cir.1986), the defendants challenged their convictions for conspiracy to import and possess marijuana, contending that if the last overt act in furtherance of the conspiracy was committed on July 12, 1979, the July 12, 1984 indictment was filed one day too late. *Id.* at 1531. Finding the *Guerro* decision persuasive, the Eleventh Circuit held that in conspiracy cases--whether an overt or covert act is alleged--the day following the event is when the statute of limitation begins to run. *Id.* at 1532-33. In a case where the conspiracy continued until July 12, 1979, the following day was the first day of the limitation period, and the indictment filed on July 12, 1984 was timely. *Id.* at 1533.

[5] This Circuit has long held that the day of the offense is excluded when determining the trigger date for the statute of limitation. *See, e.g.,* ***1255***Wiggins v. United States*, 64 F.2d 950, 950-51 (9th Cir.1933) (holding that an indictment returned on March 7, 1930 was not barred by a three-year limitation

statute where the offense occurred on March 7, 1927); *see also* United States v. Tawab, 984 F.2d 1533, 1534 (9th Cir.1993) (per curiam) (holding that a five-year limitation period for a crime completed on February 15, 1986 expired on February 15, 1991.)

Admittedly, this Court has noted in conspiracy cases that the statute of limitation begins to run on the date of the last overt act alleged, implying that the day of the last overt act is included in determining when the statute of limitation was triggered. *See, e.g.*, Lambert v. Conrad, 308 F.2d 571 (9th Cir.1962) (per curiam); *see also* Bergschneider v. Denver, 446 F.2d 569 (9th Cir.1971) (per curiam); United States v. Charnay, 537 F.2d 341, 354 (9th Cir.1976). However, because these cases did not involve prosecutions in which the indictment was filed on the anniversary of the last overt act, there was no need to analyze whether an indictment filed on this anniversary was timely. In these cases, expiration of the limitation period was not even close, and the finely tuned timing issue we now address was not presented. Because the cases that could be read to imply a holding contrary to the one we reach did not analyze the precise issue we now confront, they do not change our conclusion here. *See* United States v. Joyce, 357 F.3d 921, 924-25 (9th Cir.2004).

IV. CONCLUSION

Persuaded by the reasoning of the Second and Eleventh Circuits, and in keeping with our own analogous precedent, we conclude that the day on which the last overt act was committed in furtherance of a conspiracy is excluded from the statute of limitation period. Thus, when computing the time within which a prosecution for conspiracy must commence, the clock starts the day after the last overt act is committed.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 25, 2004
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	:
	: No. 02-53050
Plaintiff - Appellee,	:
	: D.C. No. CR-96-
v.	: 01442-NAJ
	:
ALFRED J. KOONIN,	: MEMORANDUM*
	:
Defendant - Appellant.	:
	:

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

Argued and Submitted August 6, 2003
Pasadena, California

Before: NOONAN, TALLMAN and RAWLINSON, Circuit Judges.

1. Reviewing for plain error, *see United States v. Timmins*, 301 F.3d 974, 983 (9th Cir. 2002), we reject Koonin's assertion that

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

there was insufficient evidence to support his conviction. Viewing the evidence in the light most favorable to the government, a reasonable juror could have convicted Koonin. *See United States v. Booth*, 309 F.3d 566, 574 n.5 (9th Cir. 2002).

2. Koonin was convicted on all counts for which he was charged in the indictment. That the jury verdict form misnumbered the counts did not alter the *content* of the charges. Thus, the district court acted within its discretion in correcting the verdict form pursuant to Fed. R. Crim. P. 36. *See United States v. Penna*, 319 F.3d 509, 513 (9th Cir. 2003).

3. Koonin was charged with providing only one false declaration before the grand jury. Introduction of evidence of other discrepancies in Koonin's grand jury testimony did not constitute constructive amendment of the indictment. Koonin's conflicting statements -- admissions of a party opponent under Fed. R. Evid. 801(d) -- were used to prove Koonin's guilt on the other crimes with which he was charged. Allowing consideration of these statements did not constitute plain error. *See United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001).

4. Koonin did not receive ineffective assistance of counsel.[1] His pre-arrest admissions were made when he was not in custody, *see Miranda v. Arizona*, 384 U.S. 436, 444 (1966), and his post-arrest interrogation was preceded by *Miranda* warnings. Thus, no valid basis existed to suppress his statements.

The gun at issue was not destroyed at the request of or by the federal government, and there was no evidence in the record that

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[1] We review Koonin's ineffective assistance of counsel claim on direct appeal because the record was fully developed in conjunction with Koonin's motion for a new trial. *See United States v. Ross*, 206 F.3d 896, 900 (9th Cir. 2000).

the destruction was done in bad faith. *See United States v. Belden*, 957 F.2d 671, 674 (9th Cir. 1992). Further, the gun was of no apparent exculpatory value. *See California v. Trombetta*, 467 U.S. 479, 489 (1984). Accordingly, a motion to dismiss would have been unavailing.

To establish a Fifth Amendment violation predicated upon pre-indictment delay, Koonin must show he suffered "actual, non-speculative prejudice from the delay and that the delay, when weighed against the government's reasons for it, offends those fundamental conceptions of justice which lie at the base of our civil and political institutions." *United States v. Gregory*, 322 F.3d 1157, 1165 (9th Cir. 2003) (citation omitted). Koonin did not meet this burden.

Defense counsel's decision to stipulate to the admission of the videotaped depositions at Koonin's trial was a reasonable one. The prosecution was thus deprived of an alleged delay tactic and portions of the testimony were helpful to the defense. Furthermore, Koonin agreed to use of the videotaped testimony after his counsel expressly informed him that he had the right to confront and cross-examine these witnesses.

The legal tactics challenged by Koonin all represent reasoned, strategic decisions by his counsel, and thus Koonin's ineffective assistance claim must fail. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 31 2004
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	:
	: No. 02-50350
Plaintiff - Appellee,	:
	: D.C. No. CR-96
v.	: 01442-NAJ
	: Southern District of
ALFRED J. KOONIN,	: California, San Diego
	:
Defendant - Appellant.	: ORDER
	:

Before: NOONAN, TALLMAN, and RAWLINSON, Circuit Judges.

The panel has voted to deny Defendant Alfred Koonin's Petition for Rehearing. Judges Tallman and Rawlinson voted, and Judge Noonan recommended to reject the Suggestion for Rehearing En Banc.

The full court has been advised of the Suggestion For Rehearing En Banc, and no judge of the court has requested a vote.

The petition for rehearing filed August 5, 2004, is **DENIED** and the suggestion for rehearing en banc is **REJECTED**.